



## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WT Docket No. 19-38; FCC 22-53; FR ID 99881]

### Partition, Disaggregation, and Leasing of Spectrum

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission modifies partitioning, disaggregation, and leasing rules to provide specific incentives for small carriers and Tribal Nations, and entities in rural areas, to voluntarily participate in the Enhanced Competition Incentive Program (ECIP). The ECIP proceeding is in response to Congressional direction in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act) to consider steps to increase the diversity of spectrum access and the availability of advanced telecommunications services in rural areas. The ECIP will promote greater competition in the provision of wireless services, facilitate increased availability of advanced wireless services in rural areas, facilitate new opportunities for small carriers and Tribal Nations to increase access to spectrum, and bring more advanced wireless service including 5G to underserved communities. This document also provides for reaggregation of previously partitioned and disaggregated licenses up to the original license size, while adopting appropriate safeguards, which will reduce regulatory and administrative burdens on licensees.

**DATES:** This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], except for amendatory instructions 2 (§1.929), 4 (§1.950), and 8 (§§ 1.60001 through 1.60007), which are delayed. The Commission will publish a document in the *Federal Register* announcing the effective date for the amendatory instructions.

**FOR FURTHER INFORMATION CONTACT:** Katherine Patsas Nevitt of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418-0638 or Katherine.Nevitt@fcc.gov. For information concerning the Paperwork Reduction Act of 1995 (PRA) information collection requirements contained in this final rule, contact Cathy Williams, Office of Managing Director, at (202) 418-2918 or Cathy.Williams@fcc.gov or email PRA@fcc.gov.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order* in WT Docket No. 19-38, FCC 22-53, adopted on July 14, 2022 and released on July 18, 2022. The full text of the *Report and Order*, including all Appendices, is available for inspection and viewing via the Commission's website by entering the docket number, WT Docket No. 19-38. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to FCC504@fcc.gov or calling the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### **Final Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”

Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in this final rule on small entities.

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking (FNPRM)* released in November 2022 in this proceeding (86 FR 74024, Nov. 19, 2022). The Commission sought written public comment on the proposals in the *FNPRM*, including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

### **Paperwork Reduction Act**

The requirements in §§ 1.929; 1.950; and 1.60001 through 1.60007 may constitute new or modified collections subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 104-13. They will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107-198, see 44 U.S.C. 3506(c)(4), the Commission previously sought, but did not receive, specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission describes impacts that might affect small businesses, which includes more businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis.

### **Congressional Review Act**

The Commission will send a copy of the *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the *Federal Register*.

### **Synopsis**

#### **A. Statutory Requirement**

Section 616 of the MOBILE NOW Act required that, within a year of its enactment, the Commission initiate a rulemaking proceeding to assess whether to establish a program, or modify an existing program, under which a licensee that receives a license for exclusive use of spectrum in a specific geographic area under section 301 of the Communications Act of 1934 may partition or disaggregate the license by sale or long-term lease in order to, *inter alia*, make unused spectrum available to an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area. Section 616 required the Commission to consider four questions in

conducting an assessment of whether to establish a new program or modify an existing program to achieve the stated goals. MOBILE NOW Act, section 616(b)(2)(A)-(D) (codified at 47 U.S.C. 1506(b)(2)(A)-(D)). Section 616 provided that the Commission may offer incentives or reduced performance requirements only if it finds that doing so would likely result in increased availability of advanced telecommunications services in a rural area and directed that if a party fails to meet any build out requirements for any spectrum sold or leased under this section, the right to the spectrum shall be forfeited to the Commission unless the Commission finds that there is good cause for the failure. *Id.* section 616(b)(3)-(4) (codified at 47 U.S.C. 1506(b)(3)-(4)).

## **B. Establishment of the Enhanced Competition Incentive Program**

In this final rule, we establish the ECIP largely as proposed in the FNPRM, as an initial measure to facilitate competition and increase spectrum access and rural service through transactions that meet the qualifying requirements.

## **C. Enhanced Competition Incentive Program Structure**

We establish ECIP eligibility through participation in a transaction involving partitioning and/or disaggregation, leasing, or full assignment of spectrum that meets the qualification requirements discussed below (Qualifying Transaction). Any covered geographic licensee may offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation, and any covered geographic licensee eligible to lease in an “included service,” as listed in 47 CFR 1.9005 of our rules, may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. Covered geographic licensees consist of specified wireless radio services (WRS) for which the Commission has auctioned exclusive spectrum rights in defined geographic areas. *See* 47 CFR 1.907. To ensure that appropriate incentives and benefits are afforded consistently across a variety of transaction types, we permit a covered geographic licensee to assign its entire authorization.

We note that in the *FNPRM*, we proposed that all WRS licensees in “included services” would be permitted to lease spectrum and participate in ECIP. The MOBILE NOW Act,

however, requires that we assess the administrative feasibility of adopting program features. We thus modify our proposed approach towards leasing eligibility for lessors to ensure that all ECIP participants can accept responsibility for program obligations and realize program benefits. Accordingly, we do not include all WRS licensees in “included services” as eligible lessors within ECIP, as many of the program obligations and benefits are inapplicable to site-based wireless licensees that are generally permitted to lease; we do, however, permit any covered geographic licensees in “included services” to participate as lessors in the ECIP program. Similarly, we exclude light-touch leasing spectrum manager leases of 3.5 GHz Priority Access Licenses (PALs) in the Citizens Band Radio Service, because we do not believe the light-touch leasing model allows for the level of Commission oversight necessary to practically administer ECIP and avoid potential waste, fraud, and abuse. *See* 47 CFR 1.9046, 96.32(c), 96.66. We nonetheless permit prospective ECIP participants in the Citizens Band Radio Service to enter into *de facto* transfer leases or general 21-day notification spectrum manager leases for PALs in order to access spectrum and fully receive the program’s benefits.

Some spectrum manager leases of these 3.5 GHz Priority Access Licenses (PALs) in the Citizen’s Band Radio Service are governed by the Commission’s “light-touch leasing” rules, a process that builds upon and incorporates our traditional spectrum manager leasing approval process. Lessees seeking to engage in light-touch leasing pre-certify with the FCC that they meet the non-lease-specific eligibility and qualification criteria for 3.5 GHz light-touch leasing. Rather than being approved for a lease by the Commission after an application is filed in the Universal Licensing System (ULS), light-touch leases are managed and monitored by a third-party automated frequency coordinator, known as a Spectrum Access System (SAS). The SAS administrator confirms the PALs and lessees meet the light-touch leasing criteria in their pre-certification filings and the lease-specific eligibility requirements. After SAS confirmation, the lessees may immediately begin exercising the leased spectrum usage rights under the light-touch leasing arrangements. On a daily basis, the SAS administrators provide the FCC with an

electronic report of the light-touch leasing notifications. The light-touch leases appear on our regularly issued Accepted for Filing Public Notices. *See* 47 CFR 1.9046, 96.32(c), 96.66; *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Order on Reconsideration and Second Report and Order, 81 FR 49024 (July 26, 2016), 31 FCC Rcd 5011, 5068-74, paras. 204-23 (2016) (*2016 3.5 GHz Second R&O*); *see also Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Report and Order, 83 FR 63076 (Dec. 7, 2018), 33 FCC Rcd 10598 (2018). The light-touch leasing process substituted only the immediate processing procedure of spectrum manager leases under § 1.9020(e)(2), allowing PAL licensees and lessees to enter into spectrum manager leases under the general 21-day notification procedure in § 1.9020(e)(1) with a notification to the SAS prior to operation pursuant to § 1.9046(c). *See 2016 3.5 GHz Second R&O*, 31 FCC Rcd at 5071, para. 213 & n.485 and 5074, para. 220. The Commission adopted the light-touch leasing approach because the procedures under which we normally process spectrum manager leases in other exclusive-use wireless bands would be impractical in many cases for PALs, given that a significant percentage of these light-touch leases may cover a short period of time or perhaps a single event. *See* 47 CFR 1.9010, 1.9020(e)(1), 1.9030, 1.9035, 96.32(a).

As specified in the MOBILE NOW Act, we require that each party to a Qualifying Transaction be unaffiliated. We find it in the public interest to apply the Commission's current definition of affiliate from our designated entity rules, which is a person holding an attributable interest in an applicant if such individual or entity directly or indirectly controls or has the power to control the applicant; or is directly or indirectly controlled by the applicant; or is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant. *See* 47 CFR 1.2110(c)(2), (5). We find this eligibility restriction necessary to meet the intent of Congress and ensure that the parties to a Qualifying Transaction, and therefore intended beneficiaries of ECIP benefits, are unaffiliated to prevent gaming of the program. As such, we require applicants to identify their

affiliates as part of their ECIP application in a Qualifying Transaction through the filing of a new FCC Form 602, or the filing of an updated FCC Form 602 if the ownership information on a previously filed version is not current.

We adopt two types of ECIP Qualifying Transactions: those that focus on small carriers and Tribal Nations gaining spectrum access to increase competition, in any location, whether urban, suburban or rural; and those that involve any interested party that commits to operating in, or providing service to, rural areas. In general, both assignments and leases will qualify for ECIP, if they satisfy the other program criteria.

The *FNPRM* sought comment on whether we should permit full license assignments within the ECIP and, if so, how we should implement these types of transactions. Although many of the proposed ECIP benefits would be applicable to both parties to a transaction involving partition, disaggregation (or to the lessor, in the case of leasing arrangements), they would only be available to the assignee in a full license assignment scenario because the assignor would no longer be licensed for that spectrum after consummation of the assignment. We find it inequitable to bar these types of transactions from ECIP, particularly where transactions involving partitioning and/or disaggregation of the same license the parties might seek to fully assign would be eligible. To increase program flexibility, we therefore permit transactions for full assignments of covered geographic licenses where either of the below prongs are met. We also sought comment on whether the Commission's rules permitting the sharing of performance requirements in the partitioning and/or disaggregation context runs counter to the ECIP framework as proposed in the *FNPRM*. We find that the program benefits, obligations and penalties cannot be applied equitably in a shared construction obligation scenario, and that it would not be administratively feasible to implement. Therefore, we preclude any license with an existing shared performance obligation from participation in the program, and we will not accept in the ECIP any application with an election from the parties to share performance obligations.

## **1. Small Carrier or Tribal Nation Transaction Prong**

### **a. Eligible Entities**

We determine that any covered geographic licensee is eligible to participate as an assignor and any covered geographic licensee in an “included service” is eligible to participate as a lessor, and two types of entities are eligible as assignees or lessees in a Qualifying Transaction under this first prong: either small carriers or Tribal Nations. Consistent with the MOBILE NOW Act, each party to a Qualifying Transaction must be unaffiliated.

*Small Carriers.* Section 616 of the MOBILE NOW Act defined “Covered small carrier” as a carrier that “has not more than 1,500 employees (as determined under section 121.106 of title 13, Code of Federal Regulations, or any successor thereto)” and “offers services using the facilities of the carrier.” MOBILE NOW Act section 616(a)(1), (codified at 47 U.S.C. 1506(a)(1)). The MOBILE NOW Act also applied the definition of “carrier,” as set forth in section 3 of the Communications Act of 1934, as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy.” *Id.* In the *FNPRM*, we proposed to apply the statutory definition of covered small carriers and sought comment on alternatives. We decline at this time to expand our proposed definition of covered small carriers in establishing eligibility for this prong. We note that Congress’ directive in the MOBILE NOW Act focused specifically on making unused spectrum available to covered small carriers and promoting service to rural areas, and the current record in this proceeding has not been sufficiently developed to determine whether to extend the additional incentives of the small carrier prong of ECIP beyond those entities specifically contemplated by Congress.

For purposes of this program, we therefore adopt the above statutory definition of “Covered Small Carrier” and designate them as an eligible beneficiary as a “small carrier” under this transaction prong. For ease of reference, we use the term “small carrier” rather than



“covered small carrier” used in the MOBILE NOW Act, though we incorporate into our rules the specific language of the statutory definition.

*Tribal Nations.* We include Tribal Nations as an additional eligible beneficiary in this transaction prong, independent of whether they qualify as a small carrier. We recognize the acute connectivity challenges that Tribal Nations face and believe that inclusion in the ECIP program will facilitate spectrum access by Tribal Nations in both rural and non-rural areas to help meet their communications needs. We therefore adopt our proposed definition of Tribal Nation as any federally-recognized American Indian Tribe and Alaska Native Village, the consortia of federally recognized Tribes and/or Native Villages, and other entities controlled and majority-owned by such Tribes or consortia. In the *FNPRM*, we sought comment on how we should facilitate transactions involving entities seeking to serve native Hawaiian Homelands given there are no federally recognized Tribal Nations in Hawaii. In the absence of responsive comments on this issue, we will consider future waiver requests for ECIP program eligibility on behalf of appropriate entities that manage or administer resources on behalf of Native Hawaiians or Hawaiian Homelands. We believe the inclusion of Tribal Nations in ECIP is an important step to facilitate increased spectrum access, and the Commission is committed to working with Tribal Nations to ensure that the benefits afforded through ECIP participation are fully realized.

#### **b. Minimum Spectrum Threshold**

As proposed, we adopt a minimum spectrum threshold for a qualifying transaction. Specifically, we require that, for licenses included in an ECIP transaction involving a disaggregation, partition/disaggregation in combination, or a lease, the assignor or lessor must include a minimum of 50% of the licensed spectrum, and must demonstrate that it meets the minimum spectrum threshold at every point in the transaction area (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz)). As an example, we will not permit an assignor participating in ECIP to engage in a transaction whereby it partitions an area and disaggregates

spectrum in combination, but seeks to include 75% of its spectrum in the western part of the partitioned area, and 25% of its spectrum in the eastern part of the partitioned area, in an attempt to meet the 50% minimum spectrum threshold through some form of averaging. We believe that this minimum spectrum threshold will provide stakeholders flexibility in structuring transactions to facilitate sufficient spectrum availability for the underlying intended service, while simultaneously preventing transactions involving *de minimis* spectrum amounts that are potentially entered into solely to obtain ECIP benefits.

We anticipate that secondary market transactions negotiated at arm's length will result in parties acquiring sufficient spectrum to meet their communications needs. We find that requiring minimum spectrum amounts in megahertz to ensure that a current technology can be successfully deployed reduces stakeholder flexibility. Such an approach is not technologically neutral and may not adequately account for future technological advances. By taking a technologically neutral approach that requires a fixed percentage of spectrum relative to each license included in an ECIP transaction, we provide sufficient flexibility to allow a wide range of different WRS licensees the opportunity to participate in, and benefit from, the ECIP. This approach will likely increase the number of ECIP transactions, and foster participation by not effectively barring licensees with smaller spectrum amounts based on the original spectrum allocation in a particular radio service.

Some commenters argued against a minimum threshold. We disagree. The Commission must balance the goals and benefits conferred through the program with the potential harms of abuse, and we find that establishing a minimum spectrum threshold is necessary to prevent sham transactions (e.g., disaggregation of *de minimis* spectrum amounts simply to acquire program benefits). Accordingly, we adopt a 50% minimum spectrum threshold as proposed in the *FNPRM*. Provided the minimum spectrum threshold is met, parties to an ECIP Qualifying Transaction are free to negotiate specific terms for additional amounts of spectrum required to meet their operational or technological needs.

**c. Minimum Geography Threshold**

We adopt a minimum geography threshold for Qualifying Transactions under this small carrier or Tribal Nation prong, whether a partition, partition/disaggregation in combination, full assignment or a long-term leasing arrangement. We also incorporate two-tiered geographic scaling based on the overall size of the licensed area in the underlying license from which the ECIP transaction originates to ensure equitable treatment across differently-sized licensed areas. Specifically, for licensed areas that contain 30,000 square miles or less, we require a minimum geography threshold of 25% of the licensed area. For geographic area licenses larger than 30,000 square miles in size, we require a minimum geography threshold of 10% of the licensed area. We believe this approach appropriately balances the size of the licensed area to create incentives for program participation and ensure sufficient land area for small carriers or Tribal Nations, while discouraging transactions involving *de minimis* geography entered into solely to obtain program benefits.

In the *FNPRM*, we proposed a 25% geography threshold to ensure sufficient land area was made available for the provision of advanced telecommunications services and to prevent fraud from transactions involving *de minimis* amounts of geography entered into for the singular purpose of receiving benefits. We are persuaded that the scaling concepts advanced by commenters provide a practical solution towards ensuring a fair and consistent application of the ECIP. We therefore find it in the public interest to adopt the two-tiered hybrid approach discussed above, based on the amount of square mileage within the licensed area of the assignor or lessor, regardless of the license type, to meet the required minimum geography threshold percentage. We believe this approach appropriately balances the goal of ensuring greater program participation, particularly for licensees with larger licensed areas that offer spectrum to others, and that benefit from program benefits applied to their entire license (e.g. extension of renewal deadline and construction deadlines), while protecting against potential abuse through transactions that include *de minimis* amounts of geography. Assignors or lessors are permitted to

include more of their licensed area in a Qualifying Transaction than the minimum geography threshold in this prong, up to their entire licensed area, potentially resulting in a larger Transaction Geography in a Qualifying Transaction. We believe this allows sufficient flexibility to structure transactions based on the needs of the parties.

We clarify that under the small carrier or Tribal Nation transaction prong, the geography assigned or leased can be from any type or size of covered geographic license and can include rural and/or suburban/urban areas, provided it meets the minimum geography threshold percentage described above. An ECIP transaction between unaffiliated parties, as required under this prong, may be either an assignment (full, partition, and/or disaggregation) or a lease, but not both, for each license. We impose this restriction to meet program goals, including the equitable distribution of program benefits and obligations, and therefore preclude an ECIP participant from, for example, partitioning a percentage of its licensed area, and then leasing another percentage of licensed area from the same license, which when combined meet the minimum geography threshold. While an ECIP application filed under this prong may include more than one license for assignment or leasing to a single assignee/lessee, each included license must independently meet the respective minimum geography percentage threshold, and will be independently reviewed and acted upon. Applications seeking ECIP benefits that do not satisfy the minimum spectrum and geography thresholds for each license on a stand-alone basis will be dismissed. We also clarify that parties participating in ECIP through this small carrier or Tribal Nation transaction prong remain subject to the substantive performance requirements (e.g., covering a certain population percentage, in most flexible use bands) as set forth in the underlying radio service(s) rules of the license(s) involved in the Qualifying Transaction. Finally, after review of the record, we find no basis to restrict the program to census defined populations.

## **2. Rural-Focused Transaction Prong**

To further the important Commission and Congressional goals of facilitating the provision of advanced telecommunications service in rural areas, we provide a second possible path for ECIP participants through a rural-focused transaction approach. This prong expands the scope of eligible entities beyond those specifically referenced in the MOBILE NOW Act and is intended to facilitate coverage to rural areas by tying ECIP benefits to construction and operation obligations. We believe this second transaction prong will expand the class of eligible participants, resulting in greater potential for increased spectrum usage and competition in rural areas.

### **a. Eligible Entities**

Any covered geographic licensee is eligible to participate as an assignor and any covered geographic licensee in an “included service,” 47 CFR 1.9005, is eligible to participate as a lessor. Further, any entity is eligible to participate as an assignee or lessee if able to meet the prong requirements described below, including, for example, large or small carriers, common carriers, non-common carriers, Tribal Nations, critical infrastructure entities, and other entities (large or small) operating private wireless systems. We reiterate that, consistent with the MOBILE NOW Act, each party to a Qualifying Transaction must be unaffiliated.

Commenters unanimously supported the Commission’s *FNPRM* proposal to adopt a rural-focused transaction prong available to anyone able to meet the requirements. We find it in the public interest to adopt our proposal to expand on the MOBILE NOW Act’s focus to incentivize transactions involving a wide variety of stakeholders seeking to provide services in rural areas that may currently face spectrum access challenges.

### **b. Minimum Spectrum Threshold**

Similar to our treatment of the small carrier or Tribal Nation prong above and for the same rationale, we adopt the proposed 50% minimum spectrum threshold for each license(s) included in the Qualifying Transaction of the rural-focused transaction prong. For licenses included in an ECIP transaction involving a disaggregation, partition/disaggregation in

combination, or a lease, the assignor or lessor must include a minimum of 50% of the licensed spectrum, and must demonstrate that it meets the minimum spectrum threshold at every point in the transaction area (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz)). The minimum spectrum threshold under this rural-focused transaction prong provides stakeholders flexibility in structuring transactions to facilitate sufficient spectrum availability for the provision of advanced telecommunications services in rural areas, while simultaneously preventing transactions involving *de minimis* spectrum amounts that are potentially entered into solely to obtain ECIP benefits.

In the *FNPRM*, we proposed in the rural context that a Qualifying Transaction must designate a minimum of 50% of the licensed spectrum, for each license included in the transaction, consistent with the small carrier or Tribal Nation transaction prong. We find that adopting the minimum spectrum threshold is the best approach towards advancing the Commission's goals of fostering the provision of advanced telecommunications services and providing stakeholders flexibility in structuring transactions, while preventing transactions involving *de minimis* amounts of spectrum.

### **c. Minimum Qualifying Geography**

To achieve the Commission's policy goals of facilitating *bona fide* transactions that ensure rural service while providing substantial program benefits, we require that a Qualifying Transaction under this prong (e.g., a partition, partition/disaggregation in combination, full assignment, or a long-term leasing arrangement) must include a minimum amount of "Qualifying Geography." All geography identified as Qualifying Geography, for purposes of this rural-focused transaction prong, must be in a rural area, as defined below. We adopt the statutory definition of "Rural Area," which is defined as any area except (1) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants. MOBILE

NOW Act, section 616(a)(2) (codified at 47 U.S.C. 1506(a)(2)). Although we understand concerns regarding areas adjacent to large cities/towns, we note that the MOBILE NOW Act did not provide an exception for the inclusion in the definition of “rural” those locations on the periphery of urban areas that are arguably less populated, but nonetheless are part of an urbanized area contiguous or adjacent to a city or town with a population of more than 50,000. We therefore recognize that parties may seek a waiver of the rule in certain unusual circumstances, which we will review pursuant to the criteria set forth in the Commission’s rules. *See* 47 CFR 1.3, 1.925.

As applied to the ECIP rural-focused transaction prong, we define Qualifying Geography as at least 300 contiguous square miles for those licensed areas that are 30,000 square miles and smaller, with appropriate upward scaling for larger licensed areas. After reviewing the record and the varying geographic areas the Commission licenses in greater detail, we find that our proposed scaling approach that focused on license types (e.g. Partial Economic Area (PEA) or smaller) potentially could create inequities. Commission staff reviewed data regarding license types in Covered Geographic Services, and found that, out of 410 PEAs, 399 (or 98%) were 30,000 square miles or less; however, certain other licensed areas larger than PEAs also consisted of 30,000 square miles or less. For example, 84% of BEAs, 26% of MTAs, and 28% of MEAs, consisted of 30,000 square miles or less. (The license area types reviewed include (from smallest to largest average area size): Counties, Cellular Market Areas (CMAs), Interactive Video Markets (IVMs), Basic Trading Areas (BTAs), Partial Economic Areas (PEAs), Basic Economic Areas (BEAs), Major Trading Areas (MTAs), Major Economic Areas (MEAs), VHF Public Coast (VPC), and Regional Economic Area Groupings (REAGs). *See What is Geographic Information Systems (GIS)?*, <https://www.fcc.gov/wireless/gis-wtb> (last visited April 2022)). Accordingly, were we to adopt the “PEA and smaller” approach, as proposed in the *FNPRM*, as the standard for the 300 square mile minimum Qualifying Geography threshold, 141 out of 170 BEAs, 12 out of 46 MTAs, and 13 out of 46 MEAs, all

geographic sizes larger than PEAs, but also containing only 30,000 square miles or less, would have been unnecessarily subject to higher minimum Qualifying Geography thresholds (e.g. 900 square miles). We seek to remedy this potential inequity through a more neutral approach that incentivizes transactions across all licensed areas in covered geographic services.

We therefore adopt a Qualifying Geography minimum threshold based on actual geographic license size in square miles and find that this slight modification to our proposed approach ensures equal treatment across similar sized licensed areas. Under the rural-focused transaction prong we adopt, the geographic threshold approach scaled for larger licensed areas in four categories is as follows: (1) Up to 30,000 square mile licensed areas – Qualifying Geography = 300 square miles; (2) 30,001-90,000 square mile licensed areas – Qualifying Geography = 900 square miles; (3) 90,001-500,000 square mile licensed areas – Qualifying Geography = 5,000 square miles; and (4) 500,001 square mile licensed areas and above – Qualifying Geography = 15,000 square miles.

We believe this approach ensures fairness and equal treatment across different license sizes and that scaling for larger licensed areas will ensure sufficient financial commitment by ECIP participants to yield more than nominal spectrum access. We also believe it achieves the Commission's goal of facilitating rural buildout sufficient to justify the ECIP benefits received, thus preventing windfall benefits. To afford ECIP participants substantial flexibility in structuring transactions and to incentivize participation under this rural-focused transaction prong, we permit assignors/lessors in Qualifying Transactions to include spectrum from multiple licenses, as long as the Qualifying Geography intersects each contributing license included in the underlying ECIP transaction application. To facilitate program participation under this rural focused transaction prong, however, we do not require a minimum square mileage of Qualifying Geography per contributing license, provided the sum total of the Qualifying Geography from the contributing licenses meets the required minimum threshold.



To protect program integrity, in instances where a Qualifying Transaction consists of multiple licenses with varying sized licensed areas contributing to the Qualifying Geography, we require the Qualifying Geography to be scaled to the minimum geographic threshold of the largest licensed area included. For example, where the Qualifying Geography intersects three contributing licenses and, based on their smaller overall licensed area, two of the three contributing licenses would require a minimum Qualifying Geography of 300 square miles, and the third contributing license is a larger licensed area that would require 900 square miles of minimum Qualifying Geography, we require the Qualifying Geography for this ECIP Qualifying Transaction to consist of a minimum of 900 square miles.

We do not mandate the maximum geographic scope of the parties' overall transaction, and clarify that the total Transaction Geography can be up to the entire licensed area of the contributing license(s), but no smaller than the minimum Qualifying Geography in the appropriate scaled category. This approach can potentially result in a larger Transaction Geography than the Qualifying Geography and affords program participants sufficient flexibility to structure transactions based on the needs of the parties. In this regard, we strongly encourage all parties to an ECIP transaction, and particularly assignees and lessees, to include as part of the overall transaction sufficient Transaction Geography to ensure that the Qualifying Geography will be 100% covered as required. We reiterate that both the Qualifying Geography and Transaction Geography is not determined by the Commission, but is voluntarily identified by the parties. Both assignees and lessees are required to cover 100% of the Qualifying Geography, and this requirement becomes the assignee's substituted performance obligation in lieu of the service rule obligation. We advise parties to perform the proper due diligence in advance of filing an ECIP application to ensure that site access and/or propagation issues will not prevent the assignee or lessee from meeting its construction requirement. Failure to do so, resulting in subsequent arguments that the 100% Qualifying Geography coverage requirement cannot be met, is a consideration in the Commission's evaluation as to whether the parties entered into a good

faith transaction with a *bona fide* intent to meet the program's obligations. Finally, in any transaction involving licenses authorized in mixed spectrum bands, we clarify that all end-user devices operating throughout the Qualifying Geography must be capable of operation on all spectrum bands for contributing licenses that are part of the transaction.

#### **D. Enhanced Competition Incentive Program Benefits**

In this final rule, we adopt three ECIP benefits: where applicable, we afford participants a five-year license term extension, a one year construction extension, and alternative construction requirements for rural-focused transactions.

##### **1. License Term Extension**

We adopt a five-year license term extension for the following: all parties involved in a qualifying partition/disaggregation transaction; the lessor entering into a qualifying spectrum leasing transaction, given that the lessor retains the license renewal obligations; and the assignee in full license assignments. We believe this benefit will substantially reduce regulatory burdens associated with renewal obligations and will properly incentivize secondary market transactions, particularly spectrum leases that are subject to the lessor's license term. ECIP is available to a wide variety of WRS licenses, most of which have a renewal showing obligation requiring a demonstration of continued service at or above that required to meet the original construction obligation. We believe that the license term extension benefit offers an incentive, consistent with Congressional direction, to licensees that have yet to meet their construction obligations or those that may not have maintained the required level of service throughout the course of their license term.

##### **2. Construction Extension**

We adopt a one-year construction extension for all parties to a Qualifying Transaction for both the interim and final construction benchmarks, where applicable. This benefit applies to the following parties in an ECIP transaction: both parties in a Qualifying Transaction involving partition and/or disaggregation; to the lessor in a qualifying spectrum lease arrangement, and to

the assignee in a full license assignment. We are not persuaded that additional time beyond a one-year construction extension of the service rule benchmark is warranted as an ECIP benefit. We seek to facilitate secondary market transactions that will benefit those needing increased spectrum access, as well as the provision of advanced telecommunications services to rural areas. Although Congress specifically focused on the Commission affording construction relief to help realize these policy goals, we are mindful that providing additional time to construct, while beneficial to the licensee recipient, correspondingly results in a delay in the ultimate provision of services to the public. Further, pursuant to the MOBILE NOW Act, the Commission is charged with assessing the administrative feasibility of the program, and we believe that substantially adding to the complexity of ECIP by adopting commenter-suggested gradations of construction extension benefits would not be in the public interest. MOBILE NOW Act section 616(b)(2)(D) (codified at 47 U.S.C. 1506(b)(2)(D)). Therefore, we adopt a one-year construction extension for both the interim and final construction benchmarks, where applicable. We also note that the Commission's rules are very clear with regard to circumstances that would not warrant an extension of time, and specifically state that construction and coverage deadline extension requests will not be granted due to transfers of control or assignments of authorization. 47 CFR 1.946(e)(3). For the ECIP program, Congress directed the Commission to consider incentives that we may deem appropriate to facilitate transactions, and specifically included this type of relief as a possible incentive. We find that application of this benefit serves the public interest as an incentive to participate in ECIP. We also clarify that construction deadlines previously extended through grant of a waiver may not be automatically transferrable to the assignee, unless specified by the waiver grant instrument. If transferrable, and where such further transfer is predicated upon the recipient justifying the waiver relief, ECIP assignees must separately justify any waiver relief separate from, and prior to, grant of ECIP benefits.

### **3. Alternate Construction Benchmarks for Rural-Focused Transactions**

For the rural-focused transaction prong, we substitute an assignee's existing service rule-based performance requirement, if applicable, for the entire Transaction Geography as reflected on the assignee's new license created through ECIP, with the alternative construction benchmark described below. This benefit is provided to assignees in a Qualifying Transaction involving partition, partition and disaggregation combination, or full license assignment. Specifically, under ECIP, an assignee or lessee is required to provide 100% coverage to its Qualifying Geography, which is at least 300 square miles for licensed areas up to 30,000 square miles, with upward scaling by licensed area size. Although we require an assignee or lessee to meet the 100% Qualifying Geography coverage requirement to provide rural service in exchange for ECIP benefits, we do not substitute the alternative construction benchmark to leasing arrangements, as the lessee has no service-rule based performance benchmark requiring substitution. Moreover, under the Commission's rules, the lessor has the responsibility to meet underlying performance benchmarks for its entire license and also retains the ability to count any lessee construction towards lessor's buildout obligation. We also clarify that where the Commission has previously modified the assignor's substantive service-based performance requirement through conditions granted by waiver and such requirements have not been met, the assignee will only receive the substituted alternative construction requirement if the assignee separately requests, and is granted, a waiver to receive this ECIP benefit in lieu of the modified performance requirement applicable to the assignor.

We reiterate that although we require 100% coverage of the Qualifying Geography, parties to an ECIP transaction are free to include significantly more geography than the minimum square mileage of Qualifying Geography required to be constructed. In fact, under some circumstances, the Qualifying Geography coverage requirement can likely be met through construction of a single transmitter with approximately a ten mile radius of operation, though we anticipate that assignees or lessees may deploy multiple transmitters to ensure robust network

coverage and to provide sufficient buffer to ensure 100% coverage of the Qualifying Geography. We find that substituting service rule requirements with mandatory coverage of Qualifying Geography for those assignees with remaining performance requirements represents a key benefit and an incentive to participate in ECIP, while still requiring a legitimate investment in network infrastructure that will result in public interest benefits in rural areas.

In adopting the substitution of an alternative construction requirement in lieu of service based requirements for rural-focused transactions (for assignees involved in partitioning and/or disaggregation or full license assignments), we clarify our treatment of the interim and final construction deadline in two distinct scenarios. First, where the interim performance requirement has not been met at the time of the ECIP transaction, the assignee meets its interim performance obligation for the entire Transaction Geography specified in its new authorization (if larger than the Qualifying Geography) by complying with this alternative approach, and we remove the final performance requirement set forth in the service rules for the particular license acquired in the ECIP transaction. Second, where an assignor has previously met the interim construction deadline, this alternative construction benchmark will replace the final construction obligation for the assignee's entire Transaction Geography. We believe this flexible approach will facilitate rural-focused transactions and will ensure a reasonable stakeholder investment in rural buildout sufficient to warrant ECIP benefits. In the event an assignee has no performance obligation because the respective interim and final benchmarks have been satisfied, we do not confer the benefit of a substituted performance obligation.

**E. Enhanced Competition Incentive Program Protections Against Waste, Fraud, and Abuse**

In this final rule, we adopt several measures to protect the integrity of ECIP from potential waste, fraud, and abuse and to promote the program's goals of increased spectrum access, rural service, and competition. We also clarify that, unless specified herein, participation in the ECIP does not relieve a licensee of the obligation to comply with other Commission rules including, but not limited to, the following: (1) designated entity eligibility requirements or the

obligation to make an unjust enrichment payment when required; (2) competitive review of an ECIP transaction if needed; (3) the application of a service-specific spectrum aggregation rule; or (4) obligations required by the Tribal Lands Bidding Credit rule.

These protections include: (1) a requirement for applicants seeking to participate in ECIP to select either the small carrier/Tribal Nation prong or the rural-focused transaction prong, but not both, for each ECIP transaction, without the option of changing prongs once selected; (2) a five-year holding period on licenses assigned through partitioning and/or disaggregation from an ECIP transaction, and a five-year minimum term for leasing arrangements; (3) an operational requirement of 100% coverage of the Qualifying Geography for three consecutive years for rural-focused transactions; (4) automatic termination of the relevant ECIP license and bar from future program participation for a licensee's failure to comply with the five-year holding period or to meet the applicable buildout and operational requirements (as required for rural-focused transactions); and (5) a one-time cap on ECIP benefits for each license subject to a Qualifying Transaction (e.g., the original license and the subsequent license(s) issued from a partition and/or disaggregation). In adopting these program protections, we acknowledge that ECIP is in its nascency, and that we will continue to fine-tune the program to enhance its effectiveness and to better meet our objectives. We also direct the Wireless Telecommunications Bureau to conduct an evaluation of the program and prepare a report to the Commission no later than five years after the effective date of this final rule.

As with any Commission program conferring a benefit and intended to achieve results that serve the public interest, we find it imperative to establish adequate protections to avoid the potential of waste, fraud, and abuse. Indeed, some of the protections we adopt today were specifically included in the MOBILE NOW Act and have been implemented in prior Commission proceedings to guard against anti-competitive behavior and abuse of Commission process. *See, e.g.,* MOBILE NOW Act section 616(b)(3) (codified at 47 U.S.C. 1506(b)(3)) (stating that automatic license termination is the consequence of failure to buildout); 47 CFR

20.22(c) (requiring a holding period for 600 MHz reserve licenses); 47 CFR 1.946(c) (automatic termination for failure to build-out wireless licenses in certain radio services). Based on our experience administering wireless licenses to support the provision of service to rural areas, we find that implementing the protections discussed in more detail below aligns with our program goals and serves the public interest to facilitate, as much as possible, intense spectrum utilization in these underserved areas. We believe that our approach addresses a major commenter concern (ensuring that the assignor/lessor is not unduly punished for the failings of the assignee/lessee) while also protecting ECIP from waste, fraud, and abuse.

### **1. Single Prong Selection Required for ECIP Participation**

To avoid gamesmanship and provide for administrative efficiency, ECIP participant(s) must select either the small carrier/Tribal Nation prong or the rural-focused transaction prong, even if the receiving party is otherwise eligible for both options. We find it more efficient and in the public interest to adopt a requirement that provides a clear and distinct path to ECIP participation by mandating that parties to an ECIP transaction may select either prong, but not both. This approach results in consistent application of program benefits and ensures program integrity by requiring applicants to follow through with their stated commitment to provide certain public interest benefits, and also reduces the potential for gamesmanship in ECIP prong selection. Accordingly, parties to an ECIP transaction are required to make a prong selection in the application filed with the Commission to approve the ECIP transaction, i.e., an FCC Form 603 (for partitions and/or disaggregation) or FCC Form 608 (for leases). Once the associated application has been granted by the Commission, the parties (now ECIP participants) are not permitted to change their selection.

This restriction ensures that no party changes its ECIP prong selection, particularly towards the end of the period allotted for completing construction obligations, thereby leveraging potentially more favorable regulatory requirements. For example: Licensee A (the assignor) and Licensee B (the assignee) both file an FCC Form 603 application, selecting the rural-focused

transaction prong, with Licensee B committing to provide service to a partitioned rural area of at least 300 rural square miles of Qualifying Geography as a substitute for an upcoming performance deadlines mandated under our service rules. Under this prong, Licensee B must meet the applicable construction and operational requirements for that area by the extended construction deadline. Once the Commission grants the application, Licensee B is not permitted to later elect, in lieu of meeting its obligation to provide service throughout its chosen Qualifying Geography, to meet the performance requirements applicable under the small carrier or Tribal Nation prong, i.e., covering a percentage of the population within its license area (as required in many flexible wireless radio services), which may include more sub-urban and urban populations—even if Licensee B could have originally qualified for that prong as a small carrier. We clarify that, as with any transaction seeking Commission approval to alienate licensed spectrum, and independent of ECIP, the applicant(s) must otherwise meet the requirements to be Commission licensees and the Commission must deem the transaction to be in the public interest. *See* 47 U.S.C. 310(d).

We find that this approach aligns with the program’s goals of fostering increased accessed to spectrum and the provision of rural service, ensures transparency by providing concrete criteria and expectations to program participants and the public, and is a less burdensome and a more efficient way to administer the program.

## **2. Holding Period**

With certain exceptions described below, we adopt a five-year holding period during which licensees cannot further partition, disaggregate, assign or lease licenses assigned through ECIP. We similarly adopt a five-year minimum lease term for long-term spectrum manager or long-term *de facto* transfer leasing arrangements under ECIP. Specifically, assignees of licenses obtained through partitioning and/or disaggregation or full license assignment pursuant to an ECIP-related transaction may subsequently assign or lease, in whole or in part, those licenses to other entities, regardless of whether the entity receiving the license is ECIP-eligible, only after a



five-year holding period starting from the date of license issuance, and provided that the assignee has met any relevant construction requirement (interim and final) and operational requirement discussed below (for rural-focused transactions) for those licenses. We also require lessors and lessees participating in ECIP to commit to at least a five-year lease term for long-term spectrum manager or long-term *de facto* transfer leasing arrangements. We acknowledge that this five-year restriction may not directly align with parties' immediate business needs in all cases, but we believe that this approach, on balance, best promotes the goals of the program, effectively deters unwanted behavior, and serves the public interest.

*Restriction on Leasing and Subleasing of Spectrum Rights Obtained through ECIP.* We adopt our proposed approach to prohibit the leasing or subleasing of spectrum by ECIP assignees and lessees during the five-year holding period or five-year minimum lease term, respectively. In leasing/subleasing arrangements after the applicable five-year period, the lessee or sublessee will not receive ECIP benefits, consistent with the one-time ECIP benefit rule we discuss below. We remain concerned about situations where, for example, an ECIP licensee (or lessee) monetizes its benefits by further leasing its spectrum rights to a third party, with no guarantee that the lessee/sublessee's activities will yield the public interest benefits intended by ECIP. We therefore decline to allow such leasing arrangements during the relevant five-year period to help ensure program obligations are met by assignees and lessees, given the benefits ECIP provides, and to avoid providing an opportunity for program participants to circumvent our rules.

*Exceptions to the Holding Period.* Given the realities and challenges of today's ever-growing wireless market, and our consistent approach of providing flexibility to wireless radio service licensees to foster competition, we adopt an exception to the requisite holding period for *pro forma* transactions, including transfers and assignments. We have previously found *pro forma* transactions to be in the public interest because such transactions promote competition by allowing service providers to change their ownership structure or to reorganize without

regulatory delay, increasing a provider's ability to compete in today's marketplace—a goal repeatedly advocated by Congress and the Commission.

We also adopt an exception to our holding period for lease arrangements, including subleases, involving providers of Contraband Interdiction Systems (CIS). We find that ECIP restrictions intended to prevent waste, fraud, and abuse should not be applied to vital public safety-related leasing or sub-leasing arrangements intended to deploy systems that prevent contraband wireless device use in correctional facilities. Specifically, to enable an ECIP assignee or lessee to lease/sublease a license (or some portion thereof) to a CIS provider, we will provide an exception to the: (1) five-year holding period or five-year minimum lease term; (2) operational requirement for rural-focused transactions (as applicable); (3) prohibition against leasing/subleasing during the relevant five-year period; and (4) penalties for failing to comply with certain program obligations. We find that this approach is consistent with our ECIP program goals, and enables CIS operation where needed to promote public safety. In adopting this exception, we reiterate that CIS providers require access to all the commercial spectrum bands covering the footprint of the correctional facility to effectively operate, and that any gap in coverage could render the system less effective. Because of these operating parameters, a CIS provider will likely need to enter into multiple spectrum leasing arrangements for the same geographic area covering the correctional facility. Given the public safety importance of protecting correctional facility staff and the public from the potential harms associated with the use of contraband wireless devices, we find it in the public interest to adopt narrow exceptions to the program protections.

We decline to adopt an exception for licensees that are exiting the wireless business. Given the various business models under which WRS licensees operate, we find it impractical to apply a one-size-fits-all standard to a proposed transaction involving an ECIP-participating licensee intending to exit the wireless business. We also note that the Commission does not generally permit a licensee to rely on business decisions and related transactions to justify a

request for extension or waiver of performance requirements. *See* 47 CFR 1.946. Further, applying such a rigid standard can also run counter to the goals of the ECIP; if the standard is too lenient, it may be used by an ECIP entity to circumvent the Commission's rules and, if the standard is too harsh, it may prevent program participation and/or hinder competition. We therefore elect to address these types of situations on a case-by-case basis. As such, where an ECIP licensee intends to exit the telecommunications industry prior to the end of the requisite holding period or prior to the expiration of any applicable five-year lease term, we will entertain waiver requests for review under the criteria set forth in § 1.925 of the Commission's rules. *See* 47 CFR 1.925.

We also decline to adopt an exception to the five-year minimum lease term, or an alternative penalty scheme, for lessees that prematurely terminate their lease due to an involuntary transaction, such as bankruptcy. Based on our experience gained by administering transactions involving wireless licenses, we believe that adopting an exception for a lease termination resulting from involuntary transactions is unnecessary as such circumstances are atypical. We recognize, however, that a waiver of the five-year minimum lease term may be sought in unusual circumstances.

### **3. Operational Requirement for Rural-Focused Transactions**

For rural-focused transactions, we adopt an operational requirement whereby the assignee or lessee must operate or provide service throughout the entire Qualifying Geography for a minimum of three consecutive years.

*Operational Requirement – Coverage.* Given the benefits afforded to participating licensees through ECIP, we find that adopting the operational requirement largely as proposed is in the public interest as a targeted measure to ensure that operation or the provision of service occurs throughout the entire Qualifying Geography for a sustained period. To fulfill the operational requirement, an assignee or lessee of an ECIP rural-focused transaction must, for a minimum of three consecutive years, operate or provide service to 100% of the Qualifying

Geography. Specifically, a common carrier assignee/lessee must provide signal coverage for 100% of the Qualifying Geography and offer commercial service in that area. An assignee/lessee that intends to operate private, internal communications for business purposes, including, for example, utilities, must demonstrate that it has fulfilled the three-year operational requirement by providing 100% signal coverage to the entire Qualifying Geography, and certify that it has provided continuous private communications throughout that area for a minimum of three consecutive years. We also adopt our proposal to impose a minimum level service requirement during the three-year operational period. During this three year period, operation/service must not fall below that used (or intended to be used) to meet the relevant construction requirement for assignees and lessors, and lessees must continue to provide service (or operate, to meet private internal business needs) throughout the entire Qualifying Geography, irrespective of whether the lessor attributes any of the lessee's buildout for its performance benchmark compliance.

For assignees, we note that the applicable Qualifying Geography of which 100% coverage must be met to fulfill the operational requirement could vary, depending on the size of the license(s) contributed. Where the parties in an ECIP transaction elect to contribute different license sizes to the Qualifying Geography, we will determine the size of the Qualifying Geography by using the minimum threshold applicable to the largest contributing license it intersects (e.g., if the Qualifying Geography intersects a contributing license whose licensed area size is 30,001 to 90,000 square miles, the assignee's 100% coverage requirement must be at least 900 square miles, even if the Qualifying Geography also intersects a contributing license with a licensed area of 30,000 square miles or less). In this scenario, where multiple licenses contribute to the Qualifying Geography, to meet the operational requirement, we will also require that all spectrum contributed (if from different spectrum bands) to the Qualifying Geography be accessible by end-user devices operating throughout the Qualifying Geography. By adopting such a requirement, we ensure that the alternative construction benchmark is not used in such a

way to undermine an important ECIP goal, the enabling of diverse spectrum access and the provision of service to rural areas.

*Operational Requirement – Commencement of Three Year Period.* We apply the operational requirement both to assignees (whether through partitioning, partitioning/disaggregation in combination, or full assignment) and lessees. We recognize, however, that the Commission's service rules regulate assignees and lessees differently, with varying rights and responsibilities applicable to each. For example, a lessee does not have service rule-based performance benchmarks or license renewal obligations independent of the licensee lessor, whereas an assignee is issued a separate license, may have independent performance requirements (if not previously met by the assignor), and has renewal obligations. Further, as discussed above, in the case of leasing arrangements under ECIP, we do not substitute the alternate geographic construction requirement for the service-based rule requirement, because the licensee lessor has the option of counting lessee construction towards compliance with lessor's performance benchmark. Given these distinctions in regulatory treatment, we find it in the public interest to adopt, with certain modifications, our proposal regarding the date by which operation or service must commence to ensure both timely construction and three continuous years of operation, and we clarify below the application of the rule in various scenarios that involve assignees versus lessees participating in ECIP.

To not undermine the key ECIP benefit afforded through the extension of the interim and final performance benchmarks associated with an assigned license, we will require an assignee with an upcoming interim benchmark (or final benchmark, if the interim has passed) to commence the three year operational requirement no later than the date of the extended interim (or extended final, if no interim) construction deadline. However, where a license assigned through ECIP has no service rule-based performance requirement because the licensee has met both the interim and final benchmarks, we require the assignee to commence the three year continuous operation requirement no later than two years after consummation of the ECIP

transaction. This approach ensures prompt service/operation within the entire Qualifying Geography, regardless of whether the underlying performance requirements of the assignor's license that was partitioned, partition/disaggregated, or fully assigned, have been met. This approach also recognizes that a reasonable period of time might be required to construct the entire Qualifying Geography, particularly where the assignee may have acquired the Qualifying Geography as part of a larger Transaction Geography with plans to operate or provide service beyond the Qualifying Geography as part of a larger network.

With respect to lessees, we require the three year operational period to commence no later than two years following the commencement of the lease, regardless of whether the licensee lessor has an upcoming extended interim and/or final performance benchmark, or whether it has previously met both performance benchmarks. We seek to ensure that leased spectrum within the Qualifying Geography is timely put to use in the public interest, given the ECIP benefits conferred to the licensee/lessor. This approach is therefore warranted, particularly where we do not substitute construction of the Qualifying Geography as an alternative performance requirement (unlike an assignee, where the service rule construction requirement has not yet been met) because a lessee has no independent performance obligation. Moreover, as noted, a licensee/lessor has the option, but is not required, to count lessee construction towards lessor's performance obligation, so lessee construction under the Commission's service rules is not mandatory. By requiring a lessee of spectrum through ECIP to operate or provide service no later than two years following lease commencement, we also ensure three years of continuous operation where ECIP parties enter into the minimum required five year lease term.

We clarify that the date of construction that commences that start of the required three-year period of continuous operation is the date reflected on either: (1) the assignee's timely-filed construction notification required under our service rules, *see* 47 CFR 1.946(d), informing the Commission that the relevant buildout/coverage requirement has been met for the license at issue; or (2) its Initial Operational Requirement Notification, discussed below. Because lessees

are not required under our service rules to file construction notifications, their date of actual construction will be the date indicated in its Initial Operational Requirement Notification. If the assignee or lessee files their Initial Operational Requirement Notification prior to the relevant construction deadline, we will count the date of construction certified to in that filing, as reflected in ULS, as the start date for the three-year operational period. For example, where the interim performance benchmark has not been met at the time of the ECIP transaction and the assignee does not fulfill its construction requirement until the extended interim construction deadline, the date of the extended interim deadline would apply for determining when the operational period commences. Alternatively, where the assignee elects to construct and file a notification with the Commission before the extended interim construction deadline, then the filing date of the notification governs.

*Initial and Final Operational Requirement Notifications.* In order to ensure that assignees and lessees of rural-focused prong ECIP transactions comply with the operational requirement, we require the filing of two notifications: 1) an Initial Operational Requirement Notification, to be filed within 30 days of the commencement of operations complying with the operational requirement; and 2) a Final Operational Requirement Notification, to be filed within 30 days of satisfaction of the three consecutive year operational requirement. The Initial Operational Requirement Notification must include the following: 1) the date the assignee/lessee began operations; 2) a certification that the assignee/lessee satisfies the operational requirement of 100% coverage of the Qualifying Geography for that license or lease; and 3) technical data demonstrating such compliance. The Final Operational Requirement Notification must also include the following: (1) a certification that the network satisfied the operational requirement of 100% coverage of the Qualifying Geography for three consecutive years; (2) the date on which the three year period was completed; and (3) technical data demonstrating the coverage provided. The Initial Operational Requirement Notification and Final Operational Requirement Notification are required in addition to any construction notification required to be filed with the

Commission pursuant to rule § 1.946. 47 CFR 1.946. We direct the Bureau to release a public notice providing program participants with further details regarding compliance with the Initial and Final Operational Requirement Notification procedures including, for example, the filing method and applicable fees. The data obtained from these filings will be critical component part of the Bureau's ECIP Evaluation Report, discussed below.

#### **4. Prohibition on Bad-Faith Transactions**

We find it unnecessary to penalize the assignor or lessor when the assignee or lessee is solely at fault for failing to adhere to the holding period, or meet the construction or operational requirement (for rural-focused transactions). In taking this approach, we observe that the assignee/lessee is an unaffiliated entity and that the assignor/lessor is not typically a guarantor of assignee/lessee performance, and therefore penalties should be applied to the party responsible for the violation and its affiliates. Additionally, we are aware that program participation may be hindered if we impose penalties on an assignor/lessor for the failures of the assignee/lessee that are beyond its control.

We remain committed, however, to preventing bad faith transactions which bring no public benefits in return for the ECIP benefits conferred. For instance, a licensee might actively seek an ECIP-eligible entity to derive ECIP benefits through a lease of unused spectrum rights without regard for whether that entity has the financial or technical resources to meet program requirements. Such agreements also might include compensating that recipient entity to participate in a transaction.

Accordingly, we will not penalize assignors/lessors that enter into good faith transactions with assignees/lessees for subsequent assignee/lessee failure to meet program obligations. However, where the assignor/lessor is found to have entered into a transaction solely to reap program benefits, whereby it knew or should have known the assignee/lessee could or would not meet program obligations, we will bar the assignor/lessor entity and its affiliates from future participation in ECIP (as discussed below), and may impose monetary penalties if appropriate.



In taking this approach, we strike a balance between fostering spectrum access, increased competition, and facilitating service to rural areas through program incentives, and adopting appropriate protective measures that will not unduly hinder program effectiveness.

To address this concern, we require two new certifications to be included in the assignment and/or lease applications (FCC Forms 603 and 608, respectively). First, each party to the transaction must certify either that: 1) the licensee or lessor did not confer any benefit (monetary or otherwise) to the assignee/lessee as consideration for entering into the proposed ECIP transaction; or 2) if the parties cannot make this certification, provide a description of the benefit(s) conferred. In some transactions, for example, the consideration to an assignee or lessee might include roaming privileges or sharing of infrastructure that would not be indicative of a bad faith transaction, but which nonetheless merits Commission review to ensure program integrity. Second, each party to the transaction must certify that it has entered into the transaction in good faith and that the licensee/lessor reasonably believes that the assignee/lessee has the resources and a *bona fide* intent to meet the program's obligations. We caution prospective ECIP participants that making a false certification or providing false information in an assignment or lease application is a violation of the Commission's rules, which may result in a forfeiture or other penalties. *See* 47 CFR 1.17, 1.80. Additionally, as indicated in FCC Form 603 and 608, making a willful false statement in the form or attachment is punishable by fine and/or imprisonment (under 18 U.S.C. 1001) and/or revocation of any station license or construction permit (under 47 U.S.C. 312(a)(1)), and/or forfeiture (47 U.S.C. 503). Additionally, we direct the Bureau to refer suspected ECIP-related fraud or misrepresentation to the Enforcement Bureau.

## **5. Automatic Termination and Future Bar from ECIP Participation for Failing to Meet Certain ECIP Requirements**

Consistent with the MOBILE NOW Act, we adopt our proposal to automatically terminate any license(s) assigned as part of an ECIP transaction where the assignee: (1) fails to comply with the five-year holding period; (2) fails to meet the relevant buildout requirement(s);

and/or (3) fails to fully comply with the operational requirement (for rural-focused transactions). We also bar from future program participation the licensee that was the subject of the automatic termination and/or any lessee that fails to comply with the holding requirement (including by subleasing or prematurely terminating their lease) or is found to have engaged in a bad faith transaction to obtain ECIP benefits, as well as any affiliate of those entities. This bar will also apply to lessors that prematurely terminate a qualifying lease. In addition, to ensure program integrity, we clarify that the bar will apply indefinitely to the licensee, lessor, and/or lessee, including any of its affiliates. This means any officer, director, or entity that directly or indirectly controls the licensee or is directly or indirectly controlled by the licensee, may be within the scope of persons subject to the bar. In order to maximize administrative efficiency, while also minimizing gamesmanship of our prohibition on barred entities participating in ECIP, a prospective ECIP participant will be considered “an affiliate of a barred entity” if it was affiliated with that entity either when the barred entity applied for the program for the transaction for which it was barred *or* at the time the prospective ECIP applicant applied to participate in the program. Once a licensee/lessee has been barred from program participation, it will no longer be eligible for ECIP benefits for future transactions, even if it enters into transactions that would otherwise be eligible for such benefits.

We find that the two consequences we adopt today, i.e., automatic license termination and a bar on future program participation, are necessary and appropriate measures to deter program waste, fraud, and abuse, given the substantial benefits being offered to ECIP participants. Based on our experience administering wireless licenses and programs that provide benefits in furtherance of the public interest, we find that these two penalties are appropriate measures to incentivize program participants to fulfill their core program requirements. Importantly, the automatic termination provision is consistent with section 616 of the MOBILE NOW Act, which provides that “the right to the spectrum shall be forfeited” if a party “fails to meet any build out requirements set by the Commission.” MOBILE NOW Act section

616(b)(3), (codified at 47 U.S.C. 1506(b)(3)). We also adopt these penalties to impress upon program participants the importance of meeting the obligations associated with receiving ECIP benefits and the general need for program compliance to ensure the program operates effectively.

At the same time, we seek to encourage ECIP participation by ensuring that the penalties are targeted and proportional to the gravity of the program participant's failure to meet its ECIP obligations. We therefore limit the scope of actions that would merit automatic license termination against the ECIP assignee to the following: (1) failure to meet the five-year holding period; (2) failure to meet the relevant construction requirement for all the license(s) at issue, either interim or final deadline; and (3) failure to meet the 100% coverage and three-year operational requirement for the Qualifying Geography. The actions that will result in a bar from future participation in ECIP by the culpable party, as applicable, and its affiliates, are: (1) prematurely terminating a lease within the minimum five-year term or entering into a sublease in violation of ECIP rules; (2) failure to meet the five-year holding period; (3) failure to meet the relevant construction requirement for the license(s) at issue, either interim or final deadline; (4) failure to meet the 100% coverage and three-year operational requirement for the Qualifying Geography; and (5) entering into a transaction in bad faith, solely for the purpose of obtaining program benefits.

We clarify that, where appropriate, the automatic termination penalty will apply to the subject license regardless of whether the service rules for that license would yield a more lenient result. We also note that since an ECIP lessee does not hold the license subject to a qualifying lease, the automatic license termination penalty would not apply to it. With respect to an assignee failure identified above in a rural-focused transaction, the automatic termination penalty will apply to each license that makes up any part of the Qualifying Geography. For example, if an ECIP transaction results in two assigned licenses each consisting of Qualifying Geography of 150 square miles for a total of 300 square miles of Qualifying Geography, the assignee's failure to timely construct either license will result in the termination of both licenses, given our

requirement that the entire Qualifying Geography must be constructed given the ECIP benefits conferred.

*Date on Which a Barred Licensee/Lessee Will Lose Eligibility to Participate in the ECIP and Contents of Notification.* When an ECIP licensee/lessee has failed to meet one or more of the above criteria by the relevant deadline(s), the bar commences on the date the licensee/lessee receives notice, which the Bureau will provide by letter. The letter will specify the reasons why the licensee/lessee will no longer be permitted to participate in ECIP and explain the scope and effect of the penalty. Additionally, we find that, consistent with the Commission's notice rules, notice has been provided once the Bureau sends such letter via electronic mail, using the last e-mail address of record in ULS for that licensee/lessee. 47 CFR 1.5.

*Effect of Being Barred from Program Participation.* Once an ECIP participant has been barred from future program participation, it, along with its affiliates, are no longer eligible to receive ECIP benefits for entering into subsequent Qualifying Transactions. This applies to all parties in a transaction which would otherwise be ECIP-eligible; if a barred entity is a party to the transaction, it is not ECIP-eligible and no ECIP benefits will flow to any party to that transaction, even if the transaction meets all other ECIP criteria. Given that the established bar is from future program participation, a barred licensee/lessee will continue to receive existing ECIP benefits acquired through unrelated prior ECIP transactions, provided those benefits were conferred prior to the start date of the bar. We clarify that once an entity has been barred from participation in the program, the Commission will not process a pending application for ECIP participation to which it is a party, even where the application was initially accepted for filing prior to the date the bar commenced.

## **6. Limitations on Additional ECIP Benefits for Subsequent Transactions**

We will not provide additional ECIP benefits where a licensee has already received benefits for a license involved in a previous ECIP transaction. Specifically, if a license in a given transaction has previously been involved in any ECIP-related transaction and received

ECIP benefits as a result, any party that holds that license (or some portion thereof) cannot subsequently receive ECIP benefits by including that license (including any sub-parts of the license, spectrally or geographically) in another ECIP transaction. This restriction applies to the original license in the ECIP transaction, as well as to the licenses issued through a partition and/or disaggregation. We adopt this limitation to prevent licensees from undermining our renewal and construction requirements by compounding ECIP-related extensions through multiple ECIP transactions.

#### **F. ECIP Evaluation Report**

To ensure ECIP promotes competition and increases spectrum access for small carriers and Tribal Nations, as well as increases service to rural areas, we direct the Bureau to evaluate the progress and effectiveness of the ECIP program and submit a report to the Commission, no later than five years following the effective date of this final rule. Because the report could benefit from input from interested stakeholders, we also direct the Bureau and the Consumer and Governmental Affairs Bureau to conduct outreach, prior to the Bureau drafting the report, in order to yield meaningful evaluation and feedback of the ECIP from those interested stakeholders. As part of this outreach, we expect that both the Bureau and the Consumer and Governmental Affairs Bureau will monitor the program's effectiveness for Tribal Nations. The report should include information about ECIP participation by eligible stakeholders, including the number of ECIP transactions since the inception of the program, as well as geographic areas and spectrum made available under each prong of the program. The report may include recommended rule and policy changes that would help improve the effectiveness of the program, including an assessment of whether the program is achieving benefits for Tribal Nations. Finally, the report should be made publicly available, although the Bureau may also prepare a non-public version with commercially sensitive information, if needed.

## **G. Reaggregation of Spectrum Licenses**

Independent of establishing ECIP, we adopt rules permitting license reaggregation up to the original geographic size and spectrum band(s) for the type of license, and also adopt accompanying proposed safeguards. We find that allowing reaggregation will ease the administrative burden on both licensees and Commission staff. Further, we find that allowing reaggregation will create more certainty regarding our secondary markets rules and procedures to encourage licensees to engage in these types of transactions in the first instance.

Specifically, applicants seeking license reaggregation will be required to submit an application requesting a major modification pursuant to Commission rule § 1.929, 47 CFR 1.929, as well as an attachment certifying compliance with three safeguards. The compliance certification must state that each license to be reaggregated has: (1) met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements; and (3) not violated the Commission's permanent discontinuance rules. These safeguards are intended to ensure that licensees seeking to reaggregate licenses are not doing so merely to avoid complying with the regulatory requirements (e.g. meeting performance benchmarks) associated with each license to be reaggregated.

After review of the record, we agree with the majority of commenters that argue allowing reaggregation creates a certainty that a license holder could re-aggregate partitioned or disaggregated licenses in the future which would eliminate a potential reason not to partition or disaggregate in the first instance. We find that establishing a formal process for license reaggregation reduces regulatory and administrative burdens and could incentivize, not undermine, secondary market transactions consistent with the purposes of the ECIP and the goals of the MOBILE NOW Act. As the record reflects, we anticipate that requests for reaggregation will be submitted by licensees that, for business reasons, have reacquired licenses in their (or an affiliated party's) name potentially as part of a larger transaction, and now seek to reaggregate

previously partitioned and/or disaggregated licenses into a single license largely for administrative purposes. We find that the substantial benefit of establishing a formal process for license reaggregation, coupled with our proposed safeguards to qualify for reaggregation, renders a five-year holding period unnecessary. Accordingly, we adopt our proposal to permit license reaggregation, up to the original geographic size and spectrum band(s) for the type of license, including the three safeguards described above to protect against potential abuses. We also clarify that in the event licenses identified in a voluntarily filed application for reaggregation have varying expiration dates, we will apply the earliest such date to the overall reaggregated license for reasons of administrative convenience, and to prevent the windfall of license term extensions achieved merely by seeking license reaggregation.

*Treatment of Existing Waivers Grants or Special Conditions.* We find it in the public interest to apply a flexible approach to reaggregation requests that maintains previously granted relief where applicable. We also find, however, that an automatic application of the terms and conditions of an individual license, that may have been subject to waiver relief, to the entire reaggregated license is not warranted absent a separate justification. We will apply special conditions (to reflect prior grant of waiver of application or special conditions) to a reaggregated license as necessary to identify the appropriate type and scope of relief, both spectrally and geographically, applicable to subparts of that license (e.g., variations in transmit power levels, out-of-band emission limits or other technical parameters, or alternative interference protection criteria, for specific spectrum or geographic areas associated with the reaggregated license). Finally, we direct the Bureau to issue a public notice confirming the administrative details of required filings including, for example, the filing method, electronic map format, and applicable fees. *See, e.g., Wireline Competition Bureau Provides Guidance to Carriers Receiving Connect America Fund Support Regarding Their Broadband Location Reporting Obligations*, Docket No. 10-90, Public Notice, 31 FCC Rcd 12900 (WCB 2016) (providing guidance Public Notice (PN) describing required information and filing parameters to enable carrier compliance with earlier

Commission order); *Wireless Telecommunications Bureau To Accept 900 MHz Broadband Segment Applications Beginning May 27, 2021*, WT Docket No. 17-200, Public Notice, 36 FCC Rcd 7377 (WTB 2021).

**List of Subjects in 47 CFR Part 1**

Practice and procedure, Reporting and recordkeeping requirements, Telecommunications, Wireless radio services.

FEDERAL COMMUNICATIONS COMMISSION

**Marlene Dortch,**

*Secretary.*



## Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

### **PART 1 – PRACTICE AND PROCEDURE**

1. The authority citation for part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note, unless otherwise noted.

2. Delayed indefinitely, amend § 1.929 by adding paragraph (a)(7) to read as follows:

#### **§ 1.929 Classification of filings as major or minor.**

\* \* \* \* \*

(a) \* \* \*

(7) Application or amendment requesting reaggregation of licenses pursuant to § 1.950.

\* \* \* \* \*

3. Amend § 1.948 by revising paragraph (j) to read as follows:

#### **§ 1.948 Assignment of authorization or transfer of control, notification of consummation.**

\* \* \* \* \*

(j) *Processing of applications.* Applications for assignment of authorization or transfer of control relating to the Wireless Radio Services will be processed pursuant either to general approval procedures or the immediate approval procedures, as discussed in this paragraph (j).

(1) *General approval procedures.* Applications will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (j)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 603, including any information and certifications (including those of the proposed assignee or transferee relating to

eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is filed, and must include payment of the required application fee(s) (see § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed, if filed electronically, and any required application fee has been paid (see § 1.1102); if filed manually, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days after the necessary data in the manually filed application is entered into ULS.

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts

upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (see § 1.933(a)) promptly issued after the grant.

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (j)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (j)(1) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if assigned or transferred, create a geographic overlap with spectrum in any licensed Wireless Radio Service (including the same service) in which the proposed assignee or transferee already holds a direct or indirect interest of 10% or more (see § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the assignee or transferee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (see §§ 1.2110, and 1.2111 and §§ 24.709, 24.714, and 24.839 of this chapter);

(C) The assignment or transfer of control does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules in this chapter, and there is no

pending issue as to whether the license is subject to revocation, cancellation, or termination by the Commission; and

(D) The assignment application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the assignment or transfer of control will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after the filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data in the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (see § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (see §§ 1.106(f), 1.108, and 1.113).

4. Delayed indefinitely, amend § 1.950 as follows:

- a. Revise the section heading;
- b. Add paragraphs (a)(4) and (b)(3);
- c. Revise the heading of paragraph (c) and paragraph (e); and
- d. Add paragraph (i).

The revisions and additions read as follows:

**§ 1.950 Geographic partitioning, spectrum disaggregation, and reaggregation.**

(a) \* \* \*

(4) *Reaggregation*. Reaggregation is the consolidation into a single license of two or more licenses previously disaggregated and/or partitioned.

(b) \* \* \*

(3) *Reaggregation*. An eligible licensee may reaggregate its covered geographic

license(s), provided the requirements of paragraph (i) of this section are met, and subject to the following exceptions:

(i) 220 MHz Service licensees must comply with § 90.1019 of this chapter.

(ii) Cellular Radiotelephone Service licensees must comply with § 22.948 of this chapter.

(c) *Partitioning and disaggregation filing requirements.* \* \* \*

\* \* \* \* \*

(e) *License term.* The license term for a partitioned license or a disaggregated spectrum license is the remainder of the original licensee's license term. The license term for a reaggregated license is the remainder of the license term of the license with the earliest expiration date of those included in the underlying reaggregation application.

\* \* \* \* \*

(i) *Reaggregation of licenses.* A licensee may apply to reaggregate two or more licenses that were previously disaggregated or partitioned pursuant to this section. Licenses may be reaggregated in any combination up to, but not exceeding, the original geographic size and/or spectrum band(s) for the type of Wireless Radio Service license at issue (i.e., a licensee may, but is not required, to reaggregate all licenses which were once part of the original license).

(1) *Prerequisites for reaggregation.* Licenses will only be eligible for reaggregation if they meet the following requirements:

(i) All licenses to be reaggregated must be of the same radio service, and have the same market and channel block;

(ii) Each license to be reaggregated must have met all applicable performance requirements, including any interim and final requirements, prior to the filing of the reaggregation application;

(iii) Each license to be reaggregated must have been renewed for at least one license term since the applicable performance requirements were met; and

(iv) None of the licenses for which an applicant seeks reaggregation have violated the Commission's permanent discontinuance rules, as applicable to that license.

(2) *Filing requirements for reaggregation.* Parties seeking approval for reaggregation must apply by filing a major modification application using FCC Form 601 that complies with the filing requirements described in §§ 1.913, 1.929, and 1.947, and that includes the following attachments:

- (i) A certification that the licenses meet the requirements of paragraphs (i)(1)(i) through (iv) of this section;
- (ii) An electronic map and table that together identify all licenses and spectrum to be aggregated and identify the composite license requested;
- (iii) A certification that all licenses in the reaggregation request are active under the same FCC Registration Number at the time of filing;
- (iv) A per-license list of all special conditions and a statement acknowledging that the listed special conditions will continue to apply only to that portion of the reaggregated license with respect to the spectrum and/or geography at issue, as if the license had not been reaggregated; and
- (v) A per-license list of all waivers granted and a statement of understanding that the listed waiver(s) do not automatically convey to any other portion of the reaggregated license. If applicable, the applicant shall include a statement indicating that it is seeking waiver relief through a separately filed waiver request seeking to expand the scope of previously granted relief.

5. Amend § 1.9020 as follows:

- a. Remove “and,” at the end of paragraph (e)(2)(i)(B);
- b. Remove the period at the end of paragraph (e)(2)(i)(C) and add “; and” in its place; and
- c. Add paragraph (e)(2)(i)(D).

The addition reads as follows:

**§ 1.9020 Spectrum manager leasing arrangements.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(i) \* \* \*

(D) The application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

\* \* \* \* \*

6. Amend § 1.9030 as follows:

- a. Remove “and,” at the end of paragraph (e)(2)(i)(B);
- b. Remove the period at the end of paragraph (e)(2)(i)(C) and add “; and” in its place; and
- c. Add paragraph (e)(2)(i)(D).

The addition reads as follows:

**§ 1.9030 Long-term *de facto* transfer leasing arrangements.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(i) \* \* \*

(D) The application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

\* \* \* \* \*

7. Add subpart EE, consisting of §§ 1.60000 through 1.60007, to read as follows:

**Subpart EE – Enhanced Competition Incentive Program**

**Sec.**

**1.60000 Purpose.**

**1.60001 - 1.60007 [Reserved]**

## **§ 1.60000 Purpose.**

The purpose of this subpart is to implement the Enhanced Competition Incentive Program (ECIP), a program designed to incentivize Qualifying Transactions in the Wireless Radio Services to increase spectrum access for small carriers and Tribal Nations and to increase competition, and also facilitate the provision of advanced telecommunications services in rural areas by eligible entities.

## **§§ 1.60001 - 1.60007 [Reserved]**

8. Delayed indefinitely, add §§ 1.60001 through 1.60007 to read as follows:

### **Sec.**

#### **1.60001 Definitions.**

#### **1.60002 Application requirements for program participation.**

#### **1.60003 Small carrier or tribal nation transaction prong.**

#### **1.60004 Rural-focused transaction prong.**

#### **1.60005 Program benefits.**

#### **1.60006 Program obligations.**

#### **1.60007 Penalties.**

## **§ 1.60001 Definitions.**

The following definitions are applicable to the ECIP.

(a) *Affiliate*. A person holding an attributable interest in an applicant if such individual or entity:

- (1) Directly or indirectly controls or has the power to control the applicant; or
- (2) Is directly or indirectly controlled by the applicant; or
- (3) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant; or
- (4) Has an “identity of interest” with the applicant.

Note 1 to paragraph (a). See §§ 1.2110 and 1.2112(a)(1) through (7) for further



clarification on determining affiliation.

(b) *Qualifying transaction*. A transaction between unaffiliated parties involving a partition and/or disaggregation, long-term leasing arrangement, or full assignment that meets the requirements of either the small carrier or Tribal Nation transaction prong pursuant to § 1.60002 or the rural-focused transaction prong pursuant to § 1.60003.

(c) *Qualifying geography*. Qualifying Geography is the minimum geography threshold required for the rural-focused transaction prong.

(d) *Rural area*. Rural area is any area except:

(1) A city, town, or incorporated area that has a population of more than 20,000 inhabitants; or

(2) An urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.

(e) *Small carrier*. A small carrier is a carrier, defined as any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy in section 3 of the Communications Act of 1934 (47 U.S.C. 153)), that:

(1) Has not more than 1,500 employees (as determined under 13 CFR 121.106); and

(2) Offers services using the facilities of the carrier.

(f) *Transaction geography*. Transaction Geography is the total geography included in a Qualifying Transaction.

(g) *Tribal nation*. A Tribal Nation is any federally-recognized American Indian Tribe and Alaska Native Village, the consortia of federally recognized Tribes and/or Native Villages, and other entities controlled and majority-owned by such Tribes or consortia.

#### **§ 1.60002 Application requirements for program participation.**

Applicants seeking to participate in the ECIP must submit an application on FCC Form 603 or 608, as applicable, to the Wireless Telecommunications Bureau for review and

approval that details a Qualifying Transaction through a partition and/or disaggregation pursuant to § 1.950, a full assignment pursuant to § 1.948, a long-term spectrum manager lease arrangement pursuant to § 1.9020, or a long-term *de facto* transfer lease arrangement pursuant to § 1.9030, and that:

- (a) Designates that the Qualifying Transaction identified in the application seeks consideration under the ECIP;
- (b) Selects the prong applicable to its Qualifying Transaction, either § 1.60003 or § 1.60004, but not both, even if a party to the transaction is eligible under both prongs, and demonstrates that the applicants meet each requirement under § 1.60003 or § 1.60004;
- (c) Demonstrates that the applicants to the Qualifying Transaction are unaffiliated by providing a list of all affiliated entities for each party to the transaction through the filing of a new FCC Form 602, or the filing of an updated FCC Form 602 if the ownership information is not current;
- (d) Includes a certification that the applicants to the Qualifying Transaction are not barred from the ECIP pursuant to § 1.60007;
- (e) Includes a certification that the license(s) included in the application have not previously received benefits under the ECIP pursuant to § 1.60005(e);
- (f) Includes a certification that the applicants entered into the Qualifying Transaction in good faith and that the licensee/lessor reasonably believes the assignee/lessee has the resources and a bona fide intent to meet the program's obligations;
- (g) Includes a certification that the assignor or lessor either did not confer any benefit (monetary or otherwise) to the assignee or lessee as consideration for entering into the proposed ECIP transaction or, if benefits were conferred to the assignee or lessee, the application must include a narrative with a detailed description of any benefits so conferred by the assignor or lessor to the assignee or lessee, respectively; and
- (h) Includes a certification that any lease arrangement entered into for purposes of ECIP

participation is for a minimum term of five (5) years, whether a long-term *de facto* transfer lease arrangement or a long-term spectrum manager lease arrangement.

**§ 1.60003 Small carrier or tribal nation transaction prong.**

(a) *Eligibility.* The following parties are eligible to participate through a Qualifying Transaction under the small carrier or Tribal Nation transaction prong of the ECIP: an assignor that is a covered geographic licensee as defined under § 1.907; a lessor in an included service as set forth in § 1.9005 that is also a covered geographic licensee as defined under § 1.907; and an unaffiliated assignee or unaffiliated lessee that is a small carrier or a Tribal Nation as defined in this subpart, except that a transaction shall not be eligible for participation in the ECIP under this prong if it includes either:

- (1) A license(s) with existing shared construction obligations pursuant to § 1.950(g);
- (2) An application to participate in ECIP that includes an election from the parties to share construction obligations pursuant to § 1.950(g);
- (3) A light-touch leasing spectrum manager lease arrangement(s) of 3.5 GHz Priority Access Licenses in the Citizens Band Radio Service; or
- (4) An application to participate in ECIP that includes a barred party pursuant to § 1.60007.

(b) *Qualification requirements.* An applicant in a Qualifying Transaction under the small carrier or Tribal Nation transaction prong must demonstrate that:

- (1) The ECIP transaction involving a disaggregation, partition/disaggregation in combination, full license assignment, or a lease, includes a minimum of 50% of the licensed spectrum, and meets the minimum spectrum threshold at every point in the Transaction Geography (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz);
- (2) The ECIP transaction involving a partition, partition/disaggregation in combination,

full license assignment, or a lease, includes a minimum Transaction Geography of 25% of the total licensed area for licenses with a licensed area that contains 30,000 square miles or less, or a minimum Transaction Geography of 10% of the total licensed area for licenses with a licensed area 30,001 square miles or larger;

(3) If a lease arrangement, the minimum term of a long-term spectrum manager lease or *de facto* transfer lease is at least five (5) years; and

(4) The ECIP transaction was entered into in good faith with a bona fide intent by all parties to meet the program's obligations.

(c) *Qualifying Transaction limitations.* Multiple licenses may be included in a Qualifying Transaction between unaffiliated parties under this prong, however, spectrum and geography cannot be aggregated across multiple licenses to meet the respective minimum thresholds; each license in a Qualifying Transaction shall be considered separately and must independently meet the respective minimum spectrum and geography thresholds in paragraph (b) of this section. Each license included in a Qualifying Transaction under this prong shall either be the subject of an assignment (full, partition and/or disaggregation) or a lease arrangement, but not both. A party to a Qualifying Transaction under this prong is not permitted to assign a part of a license and lease a different part of the same license to meet the respective minimum spectrum and geographic thresholds.

#### **§ 1.60004 Rural-focused transaction prong.**

(a) *Eligibility.* The following parties are eligible to participate through a Qualifying Transaction under the rural-focused transaction prong of the ECIP: an assignor that is a covered geographic licensee as defined by § 1.907; a lessor in an included service as set forth in § 1.9005 that is also a covered geographic licensee as defined by § 1.907; and an unaffiliated assignee or lessee that commits to meeting the requirements of the rural-focused transaction prong, except that a transaction shall not be eligible for participation in the ECIP under this prong if it includes either:

- (1) A license(s) with existing shared construction obligations pursuant to § 1.950(g);
- (2) An application to participate in ECIP that includes an election from the parties to share construction obligations pursuant to § 1.950(g);
- (3) A light-touch leasing spectrum manager lease arrangement(s) of 3.5 GHz Priority Access Licenses in the Citizens Band Radio Service; or
- (4) An application to participate in ECIP that includes a barred party pursuant to § 1.60007.

(b) *Qualification requirements.* An applicant in a Qualifying Transaction under the rural-focused transaction prong must demonstrate that:

- (1) The ECIP transaction involving a disaggregation, partition/disaggregation in combination, or a lease, includes a minimum of 50% of the licensed spectrum, and meets the minimum spectrum threshold at every point in the Transaction Geography (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz));
- (2) The minimum Qualifying Geography threshold of exclusively rural area is included in the application based on the following scaled categories:
  - (i) 300 contiguous square miles for contributing licenses with licensed area containing up to 30,000 square miles;
  - (ii) 900 contiguous square miles for contributing licenses with licensed area containing between 30,001-90,000 square miles;
  - (iii) 5,000 contiguous square miles for contributing licenses with licensed area containing between 90,001-500,000 square miles; or
  - (iv) 15,000 contiguous square miles for contributing licenses with licensed area containing 500,001 square miles or more;
- (3) If a lease arrangement, the minimum term of a long-term spectrum manager lease or *de facto* transfer lease is at least five (5) years; and

(4) The ECIP transaction was entered into in good faith with a bona fide intent by all parties to meet the program's obligations.

(c) *Multiple contributing licenses.* Qualifying Transactions between unaffiliated parties under the rural-focused transaction prong must specify at least one area of Qualifying Geography, and one or more licenses may contribute, via any combination of full assignment, partitioning and/or disaggregation, and/or lease(s), provided the Qualifying Geography intersects each contributing license included in the underlying application. Where multiple licenses with different size licensed areas are included in the Qualifying Transaction and each contributes to the Qualifying Geography, the Qualifying Geography must consist of the minimum geographic threshold applicable to the contributing license with the greatest square mileage in its licensed area.

#### **§ 1.60005 Program benefits.**

(a) *Program benefits.* The following benefits for license(s) included in an ECIP Qualifying Transaction filed pursuant to § 1.60002, shall be conferred upon consummation of a Commission approved assignment application, grant of a *de facto* transfer lease application, or acceptance of a spectrum manager lease application, as specified:

(1) *License term extension.* All parties to a partition and/or disaggregation Qualifying Transaction; the lessor entering into a spectrum lease arrangement Qualifying Transaction; and the assignee in a full license assignment Qualifying Transaction, shall receive a five-year license term extension on the license(s) subject to the application.

(2) *Construction extension.* All parties to a partition and/or disaggregation Qualifying Transaction; the lessor entering into a spectrum lease arrangement Qualifying Transaction; and the assignee in a full license assignment Qualifying Transaction, shall receive a one-year construction extension of both the interim and final performance requirement deadline, where applicable, on the license(s) subject to the application.

Where the Commission has previously extended a performance requirement deadline on the license(s) and that deadline has not passed, the one year extension conferred through ECIP is in addition to the prior extension, provided the extension that was previously granted, whether by rule or through waiver, is transferrable, and the assignee separately justifies such relief if required.

(3) *Substitution of alternative construction requirement.* The assignee in a qualifying partition, combination partition disaggregation transaction, or full license assignment filed under the rural focused-transaction prong in § 1.60004, shall be subject to the alternative construction requirement set forth in § 1.60006 in lieu of any applicable service-based performance requirement for the license(s) resulting from an ECIP transaction. Where the Commission has previously modified the assignor's substantive service-based performance requirement through conditions granted by waiver and such requirements have not been met, the assignee will receive the substituted alternative construction requirement benefit if the assignee separately requests, and is granted, a waiver.

(b) *Limitation on duplicative benefits.* (1) A license included in a Commission approved Qualifying Transaction in the ECIP shall be eligible for program benefits a single time per license for the license term and all subsequent renewal terms.

(2) A license, including a license resulting from a partition and/or disaggregation, previously included in a Qualifying Transaction approved by the Commission in the ECIP, shall be ineligible to receive benefits in any subsequent ECIP transaction, regardless of whether the current licensee was the beneficiary in the original or a subsequent Qualifying Transaction.

#### **§ 1.60006 Program obligations.**

(a) *Compliance with requirements under selected prong.* An assignee or lessee must comply with the requirements of either the small carrier or Tribal Nation transaction

prong in § 1.60003 or the rural-focused transaction prong in § 1.60004, as selected in its ECIP application, and is not permitted to change prongs after the consummation of the Commission approved assignment application, grant of a *de facto* transfer lease application, or acceptance of a spectrum manager lease application for a Qualifying Transaction in ECIP.

(b) *Construction requirement for rural-focused transaction prong assignees.* Assignees shall be subject to the following construction requirements for any resulting license(s) granted in a Commission approved Qualifying Transaction through partition, a combination partition/disaggregation, or full license assignment filed under the rural-focused transaction prong in ECIP, which supersedes any service-based requirement:

(1) The assignee must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography identified in the Commission approved Qualifying Transaction.

(2) The construction period is the applicable construction deadline identified on the respective license(s), as extended by § 1.60005. If no such deadline remains for the license(s), the assignee must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography no later than two (2) years after the consummation of the Commission approved application.

(3) Where the assignee is subject to both an interim and final performance benchmark, the performance requirements in this paragraph (b) shall replace the interim performance benchmark and the assignee shall not be subject to a final performance requirement.

Where the assignee has only a remaining final performance requirement, the performance requirements in this paragraph (b) shall replace the final benchmark.

(4) All end user devices throughout the Qualifying Geography must be capable of operation on all spectrum bands associated with license(s) that contribute to the Qualifying Geography.



(5) Consistent with § 1.946(d), notification of completion of construction must be provided to the Commission through the filing of FCC Form 601, no later than 15 days after the applicable construction deadline or the expiration of the two (2) year period in paragraph (b)(2) of this section.

(c) *Operational requirement for rural-focused transaction prong assignees.* Assignees in a Commission approved rural-focused transaction pursuant to § 1.60004 are subject to the following operational requirements:

- (1) Assignees must construct and operate in, or provide signal coverage and offer service to, 100% of the Qualifying Geography identified in the Commission approved Qualifying Transaction for a period of at least three (3) consecutive years;
- (2) Operation or service must not fall below that used to meet the construction requirement in paragraph (b) of this section for the entire three (3) year period; and
- (3) Assignees must construct and operate, or provide signal coverage and offer service, as required pursuant to paragraph (b) of this section, by the applicable construction deadline identified on the license(s), as extended by § 1.60005. Where no such deadline remains for the license(s), the three (3) year continuous operational requirement must commence no later than two (2) years after the consummation of the Commission approved application filed pursuant to § 1.60002.

(d) *Construction and operational requirements for rural-focused transaction prong leases.* Lessees must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography identified in the underlying Qualifying Transaction that was the basis for Commission approval in the ECIP. Lessees must meet this requirement no later than two (2) years after grant of the underlying *de facto* transfer lease application or acceptance of the underlying spectrum manager lease application, and must maintain operation for a period of at least three (3) consecutive years during any period within the initial minimum required five (5) year lease term.

(e) *Operational requirement notifications.* Assignees and/or lessees of rural-focused transactions subject to § 1.60004 must file the following notifications to demonstrate compliance with the requirements in paragraphs (a) through (c) of this section:

(1) *Initial operational requirement notification.* Assignees and/or lessees must file an initial operational notification with the Commission within 30 days of the commencement of operations that:

- (i) Provides the date operations began;
- (ii) Certifies that the operational requirement of 100% coverage of the Qualifying Geography for that assigned license or lease has been satisfied; and
- (iii) Provides technical data demonstrating such compliance.

(2) *Final operational requirement notification.* Assignees and/or lessees must file a final operational notification requirement with the Commission within 30 days of completion of the three consecutive year operational requirement that:

- (i) Certifies that the operational requirement of 100% coverage of the Qualifying Geography for three (3) consecutive years has been satisfied;
- (ii) Provides the date the three (3) year period was completed; and
- (iii) Provides technical data demonstrating the coverage provided during the three (3) year period.

(f) *Holding period.* Assignees and/or lessees participating in ECIP under either the small carrier or Tribal Nation transaction prong set forth in § 1.60003, or the rural-focused transaction prong set forth in § 1.60004, must comply with the following obligations:

(1) *Assignees.* An assignee of a license(s) granted in a Qualifying Transaction involving a partition and/or disaggregation or full assignment is required to hold any such license(s) for a period of at least five (5) years, commencing upon the consummation date of the Commission approved application filed pursuant to § 1.60002. During this holding period, except as provided in paragraph (g) of this section, the license(s) received through

ECIP is not permitted to be further partitioned, disaggregated, assigned, or leased.

(2) *Lessees*. Lease arrangements subject to the ECIP shall not be terminated by either lessor or lessee prior to the expiration of the five (5) year term required by § 1.60003(b)(3) or § 1.60004(b)(3), where applicable, and, except as provided in paragraph (g) of this section, may not be transferred or subleased to another party during the five (5) year term.

(3) *Rural-focused transaction prong assignees*. Any license(s) resulting from a Qualifying Transaction under the rural-focused transaction prong pursuant to § 1.60004 may not be subsequently assigned (partition and/or disaggregation or full assignment), leased or transferred until the following conditions have been met:

(i) The license(s) has been held by the assignee of the Qualifying Transaction for a period of at least five (5) years commencing on the date of consummation of the Commission approved application filed pursuant to § 1.60002; and

(ii) The construction and operational requirements pursuant to paragraphs (a) through (d) of this section, where applicable, have been satisfied.

(g) *Exceptions*. The requirements in paragraphs (a) through (e) of this section do not apply to pro forma transfers pursuant to § 1.948(c)(1), and do not apply to any area of the Transaction Geography and/or Qualifying Geography, which is covered by a lease or sublease entered into for the purpose of enabling a Contraband Interdiction System (as defined in § 20.30 of this chapter).

#### **§ 1.60007 Penalties.**

(a) *Automatic termination*. A license(s) resulting from a Qualifying Transaction in the ECIP shall be automatically terminated without specific Commission action or further notice to the licensee, superseding any service-based penalty, if the assignee fails to comply with any of the following:

(1) The five (5) year holding period pursuant to § 1.60006(e);

- (2) The construction requirement pursuant to § 1.60006(a) or (c), or any remaining service-based performance requirement, where applicable; or
- (3) The operational requirements pursuant to § 1.60006(b) or (c), where applicable.

(b) *Bar from future program participation.* A party participating in a Commission approved Qualifying Transaction in the ECIP shall be prohibited from future participation in the ECIP where it is found that it:

- (1) Violated the five (5) year holding period requirements of § 1.60006(e), including premature termination of a lease or entering into a sublease in violation of § 1.60006(f)(2), if applicable;
  - (2) Failed to meet the construction requirement of § 1.60006(a) or (c), or any remaining service-based performance requirement, where applicable;
  - (3) Failed to meet the operational requirements of § 1.60006(b) or (c), where applicable;
- or
- (4) Entered into a bad faith transaction in violation of § 1.60003(b)(4) or § 1.60004(b)(4).

(c) *Effect of program bar.* A bar from ECIP is applied as follows:

- (1) A program bar shall commence upon the date the assignee or lessee receives notice from the Commission via electronic mail finding a violation pursuant to paragraph (b) of this section. A barred party shall be eligible to continue to receive benefits from Qualifying Transactions in ECIP that are unrelated to the Qualifying Transaction that resulted in the program bar, provided that those benefits were conferred prior to the commencement of the program bar, as a result of the Commission accepting a consummation of an approved assignment application, granting a *de facto* transfer lease application, or accepting a spectrum manager lease application, as applicable.
- (2) A program bar shall also apply to affiliates of barred parties. Third-parties shall be considered affiliates of a barred party if they qualify as an affiliate under § 1.60001. A prospective ECIP participant will be considered a barred affiliate when either:

(i) The third-party was identified, or should have been identified, as an affiliate on the initial Commission approved application for the Qualifying Transaction resulting in the bar; or

(ii) The third-party identifies, or should have identified, a barred affiliate in a subsequent application to participate in the ECIP, regardless of whether they were affiliates at the time of the filing of the initial application for a Qualifying Transaction resulting in the bar.

(3) Transactions that include a barred party shall not be eligible for ECIP benefits, even if all other qualifications are satisfied.

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